Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-858

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District, and CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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The state appellants* file this Brief in Opposition to the Motion to Dismiss or Affirm pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States,

* In this brief we substitute now Governor Hugh L. Carey for Defendant Malcolm Wilson, who has left the Governorship and note that the Court has filed this appeal with Governor Carey as Appellant.

and to supplement the Jurisdictional Statement heretofore filed in this appeal, 74-858 and the companion appeal, *Curtis Circulation Co., et al.* v. *Sugar*, 74-859.

The appellees in their Motion to Dismiss or Affirm, we believe erroneously, place total reliance on *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 43 U.S.L.W. 4192 (January 22, 1975), to assert that the instant appeal no longer presents a substantial federal question warranting the noting of probable jurisdiction. On the contrary, that case does not impair the substantial character of the questions presented by this appeal but rather demonstrates the vital necessity for this Court to recognizable validity of the process provided for by such statutes as that of New York.

In their Jurisdictional Statement (J.S. 9), the state appellants noted that this Court had granted certiorari in *North Georgia Finishing, Inc.* v. *Di Chem, Inc.*, 417 U.S. 907. We also pointed out that the matter involved prejudgment garnishment (or attachment) *without* a court or judge's order. (J.S., p. 9, ftn.). After submission of the Statement (January 13, 1975), the Court rendered its decision in *North Georgia Finishing, supra.* In reversing the judgment of the Georgia Supreme Court, 231 Ga. 260, 201 S.E. 2d 321 (1973), this Court stated that the Georgia statute was not saved by *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974). The statute, Georgia Code Annotated § 46-101, as stated by the opinion of this Court,

> ". . . has none of the saving characteristics of the Louisiana statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. § 46-103. The affidavit, like the one filed in this case, need contain only conclusory allegations. The writ is issuable, as this one was, by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee. Here a sizable bank account was frozen, and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be." 43 L.W. at 4194 (ftn. omitted).

However, as recognized by even the District Court opinion, now reported at 383 F. Supp. 643, the New York statute, CPLR Art. 62, undoubtedly contains four of the five "procedural assurances" contained in the Louisiana statute, 383 F. Supp. at 647, and cited approvingly in *Mitchell.* It only concluded that the immediate post-attachment hearing, provided by CPLR 6223, did not come up to *Mitchell* standards, *supra* at 648-650.

Yet, the facts of this case and New York practice require that before attachment issues, the judge determines whether the plaintiff has (1) a cause of action and (2) grounds for attachment. The companion brief in opposition of the appellants Curtis Circulation Co., *et al.*, as well as our Jurisdictional Statement, p. 8, demonstrates that the attaching plaintiff has a significant burden of proof. Properly analyzed New York via CPLR 6212 and 6223 provides all the procedural and substantive protections the Louisiana statute provided, La. Code of Civil Procedure 3506. Of course, the Georgia statute failed to provide any "provision for an early hearing . . ." 43 L.W. at 4194. Indeed this would be dispositive of the unconstitutionality of the Georgia statute, rendering further analysis unnecessary and, therefore, dicta.

There is no doubt that "(p)laintiffs, to obtain an attachment under New York law, which governs, are required to establish prima facie the existence of a cause of action . . .",

Aerotrade, Inc. v. *Banque Nationale de la Republique D'Haiti*, 376 F. Supp. 1286, 1287 (S.D.N.Y. 1974). Whether on notice or *ex parte*, this is not a pro forma matter. See also, as to grounds for attachment, *Maitrejean* v. *Levon Properties Corp.*, 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974), J.S., p. 8; *Eaton Factors Co., Inc.* v. *Double Eagle Corp.*, 17 A D 2d 135, 232 N.Y.S. 2d 901 (1st Dept. 1962). The latter case fully demonstrates the careful scrutiny courts place an attachment under on a motion to vacate. This is followed by the New York federal courts applying the law also. *Reeda* v. *Mastercraft Electronics Corp.*, 297 F. Supp. 815, 820 (S.D.N.Y. 1969).

Undoubtedly, under the exacting New York procedure, requiring judicial supervision•, the creditor has already proof "of the grounds on which the writ was issued." The judicial nature of the issuance of attachment in New York requires the creditor to establish "probable cause . . ." for the attachment. Given this state of the law, supported by the actual factual pattern of the instant case, the attaching plaintiff has already sustained a substantial burden in obtaining the writ, warranting shifting the burden (of going forward) on a CPLR 6223 motion to the defendant.

New York's attachment statute is a carefully drawn statutory scheme, available only in specified instances,•• balancing the interests of both parties, in a manner, beyond cavil, similar to the Louisiana statute upheld in *Mitchell* v. *W.T. Grant Co., supra.*

• To quote the dissenting opinion in *North Georgia* (ftn. 4, p. 8, Motion to Dismiss or Affirm) as authority that the "clerk-judge distinction is of little significance" totally ignores the great significance the opinion of the Court places on it. (43 L.W. at 4194).

•• N.B. that Georgia garnishment is available in any pending civil action. *Morrow Electric Co., Inc.* v. *Cruse*, 370 F. Supp. 639, 640 (N.D. Ga. 1974).

CONCLUSION

Probable jurisdiction should be noted.

Dated: New York, New York, February 11, 1975.

Respectfully submitted,

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